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NO. 962

IN THE

Supreme Court of the United States

October Term, 1941

ESTHER P. DEERE, ADMINISTRATRIX OF THE ESTATE OF AMOS J. DEERE, DECEASED,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

We have included the following statement of the case because neither the Petition nor Petitioner's Brief adequately or accurately sets forth the facts necessary to a correct determination of the questions involved.

At the pretrial conference in the trial court, the following facts were agreed upon:

> "Defendant (respondent) herein is a Kentucky corporation engaged in the operation of a railroad in interstate commerce, one line of which is located

through Monterey County, California. Plaintiff's decedent, Amos J. Deere, was on the 21st day of March, 1939, in the employ of defendant as a signalman, and in the afternoon of that day, while engaged in the course of his employment with defendant and in the aid and furtherance of interstate commerce in Monterey County, California, received injuries which caused his death. Amos J. Deere was then 51 years of age and had a life expectancy, according to the American Experience Tables of Mortality, of 20.20 years, and was earning between $150.000 and $170.00 per month. Plaintiff was, on July 21, 1939, in Multnomah County, Oregon, appointed administratrix of the estate of Amos J. Deere, and brings this action as such administratrix to recover, under the provisions of the Federal Employers' Liability Act, as it existed on March 21, 1939, damages from defendant for the death of Amos J. Deere, for the benefit of his minor children and herself as alleged widow. There is available to defendant in this action, the defense of assumption of risk. The controversy between plaintiff and defendant exceeds in value the sum of $3,000.00, exclusive of interest and costs.

"Plaintiff's decedent, Amos J. Deere, was married to plaintiff, now known as Esther P. Deere, on the 20th day of March, 1913, in Lane County, Oregon. Thereafter, plaintiff and Amos J. Deere lived together as husband and wife for some years and five children were born of this marriage. Of these children, three were minors at the time of Amos J. Deere's death, their respective ages being, Dallas Deere, 20 years, Helen Deere, 17 years, and Margaret Deere, 16 years. Plaintiff seeks to recover from defendant damages equal to the total reasonable expectancy of pecuniary loss to these children and to his alleged widow.

"In the year 1924 Amos J. Deere was in the employ of Southern Pacific Company in Oregon and during

that year moved to the State of Arizona where he continued to work for Southern Pacific Company. Plaintiff has no knowledge of any dissolution or divorce of the 1913 marriage between Amos J. Deere and herself. Plaintiff seeks to recover from defendant in this action for the benefit of herself as widow by virtue of this 1913 marriage her reasonable pecuniary loss by reason of the death of Amos J. Deere.

"The railroad track of defendant through the County of Monterey, California, extends generally in a northerly and southerly direction. On the afternoon of March 21, 1939, plaintiff (Petitioner's decedent), as a part of his duties as signalman, was engaged in maintaining the block system on defendant's railroad, in the aid and furtherance of interstate commerce in said county, and in performing his duties was operating a motor car furnished him by defendant, which motor car weighed approximately 425 pounds. He was at that time operating the motor car in a northerly direction along the main track of defendant's railroad. At the same time defendant was operating a certain freight train consisting of an engine, 72 empty cars, 5 loaded cars, and a caboose, in a southerly direction on the same track. It was a dry, clear day. There was no obstruction to vision between Amos J. Deere and the south-bound train of defendant, which was proceeding at a speed of about 35 miles an hour from the time the train and Amos J. Deere were within a mile to half a mile of each other. The whistle on defendant's locomotive was sounded and after some delay Amos J. Deere commenced to remove the motor car which he was operating from the track.

"Before said motor car was entirely removed from the track a collision occurred between the train of defendant, the motor car, and Amos J. Deere, in which collision Amos J. Deere was injured so severely that he died instantly."

The evidence referable to the negligence charged by petitioner against respondent is set forth hereafter in the argument.

At the close of all the testimony, the trial court granted respondent's motion for a directed verdict, stating as its reason that there was no evidence of negligence on the part of respondent and that in any event petitioner's decedent assumed the risk as a matter of law (R. 221-223). The Circuit Court of Appeals affirmed the judgment of the trial court (R. 267-276).

REASONS RELIED ON FOR ISSUANCE OF THE WRIT

Petitioner asserts two reasons why certiorari should be granted.

First, Petitioner claims that the decisions below are in conflict with (1) the applicable decisions of this court, (2) the decisions in the other circuits, and (3) the decisions of the Circuit Court of Appeals of the Ninth Circuit in the case of *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Kane,* 33 F. (2d) 866; certiorari denied 280 U. S. 588.

Second, Petitioner asserts that the decisions below have fixed the quantity of evidence necessary to prove the elements of the last clear chance or humanitarian doctrine, which question has not been, but should be, definitely settled by this court.

Respondent contends, with respect to petitioner's *first* reason, that all of the cases cited by petitioner are clearly

distinguishable on their facts and there is *no* conflict in so far as the applicable principles of law are concerned.

In so far as petitioner's *second* reason is concerned, respondent contends that the decisions below merely hold that petitioner failed to prove either of her charges of negligence.

Neither the trial court nor the Circuit Court of Appeals fixed the quantity of evidence necessary to prove the elements of the last clear chance or humanitarian doctrine. They merely held that under the evidence the necessary elements required to invoke the doctrine were lacking.

The cases which are cited by petitioner to support her claim of a conflict between the circuits, etc., are the same cases that were relied upon below. All of them were correctly distinguished on their facts by the trial court and the Circuit Court of Appeals.

ARGUMENT

Summary of Contentions of Petitioner and Respondent

Petitioner charged respondent with negligence in two particulars: (a) In failing to provide a second man on the motor car to assist decedent in removing it from the track, (b) In failing to avoid the collision under the humanitarian, or last clear chance doctrine.

Petitioner contends, with regard to the issue of respondent's negligence, that evidence was produced which war-

ranted the submission of the case to the jury under both charges of negligence.

Respondent contends the evidence did not warrant the submission of either issue to the jury and that the trial court and the Circuit Court of Appeals properly ruled that the evidence was insufficient as a matter of law.

Respondent charged that decedent's own negligence (a) in failing to acquaint himself with the trains moving over its tracks; (b) in failing to heed the block semaphore signal which was in his view for over 2000 feet as he approached the point of collision and indicated the immediate approach of the train; (c) in failing to stop and remove his motor car when the train first came in view; (d) in failing to heed the signals from the train; and (e) in failing to step aside and avoid being struck, caused his death; and, in any event, he assumed the risk of (1) failing to advise himself of the approach of the train; (2) of removing the car which he was furnished without assistance, and (3) of remaining on the track in front of the train.

With regard to these issues *respondent contends* that under the undisputed facts the authorities clearly establish that decedent assumed the risk as a matter of law and that the trial court was correct in so ruling. *Petitioner contends* that the undisputed facts do not warrant any such disposition of the case.

Insufficient Help

SUMMARY: *Since Deere had handled the same car alone for eleven years, removing and re-railing it many times each day, and since signal men have always operated alone, it*

cannot be contended that a second man should have been furnished to help him remove the car.

In considering petitioner's first contention,—that the evidence warranted the submission of the question whether respondent was negligent in failing to provide another man to help decedent remove the car,—the following evidence, which is undisputed, is material.

THOMAS ARMSTRONG, Signal Supervisor of appellee and petitioner's decedent's immediate superior, testified as follows (R. 194):

"Q. Is it the practice for signal maintainers to operate these cars alone?

A. Yes, sir.

Q. Has it always been the practice for them to operate alone?

A. As long as I can remember they have.

Q. What can you say as to the ability of Mr. Deere to take that car from the track alone?

* * *

A. Well, in my acquaintance with Mr. Deere, he has handled that same car since 1928 on that same section, and during that time it was part of his duties daily to get out of the way of every train to cover his section, which was twenty-two miles in length, and which necessitated that he had to clear the track for every train, so there was no question about him being———

* * *

A. (Continuing). So he was capable of removing the car or putting it on the track.

MR. DEZENDORF: Q. Did you ever see him do it in your presence?

A. Yes, many times.

Q. So that you have actually seen him move that same car off the track alone?

A. Yes, sir.

Q. Can you do it yourself alone?

A. Yes, sir.

THE COURT: Q. How about putting it back up over that sixteen per cent rise, sixteen-inch rise; do you know what I mean? The eight inches of the ties and eight inches of the ballast.

A. Are you speaking now about Deere or myself? He was asking me if I could do it.

Q. Yes. Can you do it?

A. Yes, sir, I can.

MR. DEZENDORF: Q. Did you ever see Mr. Deere do it?

A. Yes, sir.

Q. In fact, it is done every day by all of the signal maintainers, isn't it?

A. That is right."

FREDERICK EUGENE LAMPHIER, Locomotive engineer on the train which struck decedent, testified as follows (R. 117):

"Q. Mr. Lamphier, had you seen Mr. Deere take a car off similar to this before the accident?

A. Seen him do what?

Q. Had you seen him take a car off like this before?

A. I bet I have met him at that same crossing in the six years a dozen times.

Q. And you have seen him take a car off at that same place?

A. I wouldn't say how many times I have, because you go every day and you will meet the different ones at different places all along the road, and *I have seen him take them off there time and time again.*"

In the face of the above testimony (which is not referred to in the Petition or the brief supporting it) counsel for Petitioner apparently contends that the fact that on this one occasion, for some unexplained reason, deceased failed to remove his car before the engine struck it, authorized the submission to the jury of the question whether there should have been another man along with him to help him remove the car.

Three cases are cited by petitioner's counsel to sustain his contention. They adequately demonstrate without the help of other authority that the evidence in the case was insufficient to warrant the submission of the issue to the jury.

The first case cited is *Chesapeake & O. Ry. Co. v. Winder,* 23 F. (2d) 794 (C.C.A. 4th Cir.). In that case plaintiff was one of *two* firemen employed by the defendant on a car float operating on the water between defendant's terminals at Norfolk and Newport News. It was part of the duties of the firemen to assist each other in the task of mooring the float at the terminals.

On the night of the accident, for reasons which are not explained, plaintiff was the only fireman on the float and when it arrived at Newport News the pier ordinarily used for tying up the float was occupied and an attempt was made to tie up at a pier for ocean-going vessels which was much higher than the usual terminal. Plaintiff was in-

jured while acting under orders of his superior in attempting *alone* to make the line fast on the strange pier. Plaintiff recovered a verdict in the trial court and the circuit court of appeals affirmed the judgment, saying on page 795:

> "Three main points are raised here by the defendant: First, that there was no evidence of negligence sufficient to render defendant liable; second, that the plaintiff assumed the risk; third, that the verdict was excessive, or that in fixing the amount the jury did not take into consideration any evidence of contributory negligence on the part of the plaintiff himself.
>
> "On the first point, *the evidence shows that defendant through its agents undertook to tie up the car float to a dock not built for that purpose.* In the operation of its business in the harbor, at Norfolk, the defendant must certainly be charged with the responsibility of having proper facilities for operation. *The float at the time of the injury complained of was not properly manned, as it is admitted that ordinarily two firemen worked on the float and assisted each other in the mooring.* There was certainly enough evidence on these points to justify the case going to the jury."

While in the above case it was admitted that the float was shorthanded and the person who usually helped plaintiff tie up the float was absent, *here under the undisputed testimony it has always been the practice of signal maintainers to handle their cars alone.* (R. 194)

While there was evidence in the above case that defendant undertook to tie up at a dock with which he was unfamiliar and which was not suited for the purpose, *here decedent had handled the same car alone since 1928 on the same section of track and had removed it to make way for trains many times each day during the entire 11 years preceding the accident.* (R. 195)

The complete lack of similarity between the above case and the instant case amply serves to distinguish them.

The second case cited by petitioner's counsel is *Christie v. Great Northern Ry. Co.*, 132 Or. 321. In that case plaintiff was a brakeman on one of defendant's local freight trains. He was injured while he and the conductor were attempting to unload a set of engine wheels from a car. Plaintiff charged defendant with negligence in directing an insufficient number of men to assist in unloading the wheels and attempted to fix the defendant with liability because the conductor negligently let go of his hold on the wheels while plaintiff and the conductor were attempting to lift them. The jury returned a verdict for plaintiff after the Court had overruled defendant's motion for directed verdict and the defendant appealed, contending among other things that there was no evidence of negligence on its part. The Oregon Supreme Court held that under the particular facts involved, it was proper to submit the question of defendant's negilgence to the jury.

In our judgment the following difference in facts distinguishes the case from the instant case:

(1) In the Christie case the plaintiff was not accustomed to moving wheels of the type he was attempting to lift at the time he was hurt. In this case petitioner's decedent removed the same car from the tracks every day for eleven years prior to the accident. (R. 195)

(2) In the Christie case he was working under the immediate supervision and direction of the conductor and it was the conductor's job, not his, to call in additional help

if it was needed. In this case it has always been the duty of signalmen to handle their own cars and they know by experience that they can and must move them alone.

(3) In the Christie case plaintiff was doing exactly what the conductor told him to do at the time he was hurt. Here petitioner's decedent was free to handle his own movements and no superior's order required him to stay with the car if it were stuck and not step aside to save his life.

The third case cited by counsel for petitioner is *Makino v. S. P. & S. Ry. Co.,* 155 Or. 317. It is concerned solely with the question of assumption of risk and is not in point for that reason. In addition, as distinguished from this case, the evidence showed that plaintiff was not accustomed to lifting rails which was what he was doing at the time he was hurt. He had lifted a rail only once before and that was just a few days before he was hurt. Plaintiff in that case was an uneducated Japanese who was working under the immediate direction of a foreman, Here decedent was a skilled, experienced, intelligent workman who always worked alone and handled his car alone and without difficulty.

Petitioner's counsel has not cited a single case (nor can one be found) where a court, under circumstances similar to the instant case, has submitted to the jury the question of negligence in furnishing insufficient help.

Last Clear Chance

SUMMARY: *Since Deere knew the train was approaching and he could have avoided being struck*

even up to the last fraction of a second by stepping from between the rails, it cannot be said that the respondent had the last opportunity to avoid the accident so as to impose liability upon it under the humanitarian, or last clear chance doctrine, especially since it conclusively appears that when it first became apparent that Deere was having trouble removing the motor car, it was then too late to stop the train before it reached the point of collision.

The second point raised by counsel for petitioner in connection wth his first specification of error is that under the facts and circumstances shown by the evidence, the court should have submitted the case to the jury under the humanitarian or last clear chance doctrine. (Petitioner's brief p. 15.)

Petitioner takes the position that the humanitarian or last clear chance doctrine applies since the respondent knew and appreciated, or should have realized that deceased was in a perilous position, assumed by his own negligence, from which he was not able to extricate himself and that respondent failed and neglected to take available and appropriate steps to avoid the collision.

Respondent contends that the humanitarian or last clear chance doctrine is not applicable, *First*, because petitioner's decedent never was in a position from which he could not escape prior to the collision since he was absolutely free to step off the track and avoid the accident even up to the last second before it occurred. *Second*, that respondent never knew or realized or should have realized

that petitioner's decedent could not or would not step aside to avoid the collision. *Third,* when it first appeared that decedent was having difficulty moving the car, it was then too late to stop the train before passing the point of collison.

Counsel for petitioner attempts to avoid the effect of the obvious fact that there was nothing to keep petitioner's decedent from stepping aside to avoid the accident, by contending that petitioner's decedent was unaware of the approach of the train. (See top line Petitioner's Brief 18 and R. 272.) However, before this theory will stand not only must it be proven that decedent was unaware of the approach of the train, but it must also be shown that the engineer knew and appreciated, or as a reasonable person should have appreciated, that the decedent was unaware of the approach of the train *in time to have stopped the train before reaching the motor car.* Unless *all three* elements are proven, the whole theory totally collapses.

At this point it is desirable to summarize the evidence touching the questions (1) whether the deceased knew that a train was coming, (2) whether the respondent ever realized petitioner's decedent would not step aside to avoid being hit, and (3) whether the train could have been stopped after the engineer realized the deceased was having trouble moving the motor car.

With regard to petitioner's decedent's knowledge that a train was approaching, the evidence (all of which is undisputed) shows:

(1) *Petitioner's decedent knew the train was coming before it came into view* because the semaphore block signal, which he was approaching and could clearly see for the

last 2138 feet which he traveled prior to the collision, automatically indicated the approach of the train after it passed a point 8700 feet north of the semaphore. (R. 17, 85, 171, and 175.)

(2) Petitioner's decedent could clearly see respondent's train during the entire time he traveled the last 2020 feet approaching the semaphore near which the accident happened. (R. 17 and 172.)

(3) Petitioner's decedent started to remove his car when the train was a quarter of a mile or 1320 feet from him (R. 64 and 95) and after he had been warned twice by the whistle of the engine. (R. 64, 78, 93, 95 and 135.)

(4) Three separate whistle signals were given before the accident. (R. 64, 93, 95, 115, 133 and 139.)

(5) *Petitioner's decedent was looking toward and at the approaching train just before the collision.* (R. 114.)

Following is all the evidence on the question whether the respondent realized decedent would not step aside and thus avoid being hit.

FREDERICK EUGENE LAMPHIER, Engineer:

"Q. At the time you last saw him, was there still time and opportunity for him to step aside so far as you could see?

A. Yes, sir."

(R. 88).

"A. Yes, sir. I figured he was off."

* * *

"MR. DEZENDORF: Q. Now, Mr. Lamphier, why did you apply the emergency brake when you did?

A. I figured it was going to hit the motor car any way if he didn't get off."

(R. 89).

"MR. DEZENDORF: Q. Did you see anything that would prevent Mr. Deere from stepping aside and letting the locomotive go by?

A. No, nothing at all there."

(R. 91).

"BY MR. DEZENDORF:

Q. Just one more question. I am not sure whether this has been covered or not. How many times did you give Mr. Deere a warning signal before the collision?

A. Three times.

Q. And when was the last time?

A. Just before we hit him, I hung on the whistle to force him off the track any way if he couldn't get the car off. That was my idea."

(R. 93).

"Q. Mr. Lamphier, at the time you blew the second signal when you were a quarter of a mile away about, Mr. Deere then being at the landing about—that is correct, isn't it?

A. Yes.

Q. Did Mr. Deere have time in the ordinary course of the way those things go to then have time to get his speeder off?

A. Oh, yes, I figured he had plenty of time to get it off then. I have had a lot closer calls than that and knowed them to get them off."

(R. 110).

"BY MR. DEZENDORF:

Q. I am showing you now defendant's pre-trial exhibit 22, which is a view taken from the same place

of the same car, and I will ask you if the man who appears in the picture is in approximately the same position as Mr. Deere was the last time you saw him?

A. He was stooping over more than that.

Q. Was he about in the same location?

A. The same location, but he was stooping over.

THE COURT: Q. *Do you know whether he was looking at you like that picture shows that man looking north?*

A. *Yes, he was looking toward me, see.*

MR. DEZENDORF: We offer that in evidence.

A. (Continuing). That made me figure he was going to step off any time.

THE COURT: Give it to Mr. Hanley. He hasn't seen it.

A. (Continuing). I figured he was going to watch me that close and then he was going to step off."

(R. 114).

Q. * * * The car that you struck or before you struck Mr. Deere, that speeder appeared to be stuck in the ballast or it was too heavy for him; isn't that true?

A. I couldn't say it was too heavy for sure. I couldn't say that, because the other men get it off there all the time."

(R. 116).

"Q. Mr. Lamphier, had you seen Mr. Deere take a car off similar to this before the accident?

A. Seen him do what?

Q. Had you seen him take a car off like this before?

A. I bet I have met him at that same crossing in the six years a dozen times.

Q. And you have seen him take a car off at that same place?

A. I wouldn't say how many times I have, because you go every day and you will meet the different ones at different places all along the road and *I have seen him take them off there time and time again.*"

(R. 117).

"BY MR. DEZENDORF:

Q. *Mr. Lamphier, while Mr. Deere was in your view prior to the collision, was there anything about his actions or situation which led you to believe that he could not or would not step aside so as to avoid being struck by the locomotive?*

A. *Nothing at all.*

* * *

A. *There was not.*

MR. DEZENDORF: Q. *Did you prior to the collision ever become aware of the fact that Deere was not going to step aside so as to avoid being struck?*

* * *

A. *No, I never. I figured he was going to get off any time.*

Q. *Either before or after you made the emergency application of the brakes, were you aware of the fact that Deere was not going to step aside so as to avoid the accident?*

* * *

A. *I figured he would get off any way and let the car go. He had plenty of time. All he had to do was take two steps and get off, let the car go.*"

(R. 185-186).

The following testimony of the engineer explains the time when he made the service application of the brakes and later the emergency application:

"Q. And how far away from you—how far away from him were you when you first applied your air, that is, your air brakes, I mean, or you attempted to stop the train?

A. Oh, I will say—well, between—a little less than a quarter of a mile from him.

Q. Do you remember when this deposition was taken, Mr. Lamphier, on the 4th of November, 1939, in San Luis Obispo?

A. Yes.

Q. Before Mr. Roy Mingins, that is, he was the court reporter? You recall the deposition?

A. Yes, I remember it.

Q. And appearing there? And you were asked the question, 'And when did you first apply your air, how far away were you,' and you answered, 'Well, I should judge about, I guess, a quarter of a mile from him'—

A. That is about it, a quarter of a mile.

Q. (Continuing)——'because that is when I first gave it the service application'?

A. That is about what I said.

Q. I understand you to say it was less than a quarter of a mile?

A. Around a quarter of a mile, I said.

Q. You don't want to change that?

A. I said around a quarter of a mile then.

Q. How much air did you have in your train line?

A. 70 pounds.

Q. And how much reduction did you make—

A. Eight pounds.

Q. (Continuing)——of your train line?

A. Eight pounds.

Q. Explain to the jury what the effect of that reduction was?

A. Well, it would reduce the speed of the train. Well, it all depends—if you leave it there and don't

give it no more at all, the train would automatically stop itself.

Q. How far did the service application—how did it slow your train down?

A. It slowed it from, I will say, thirty-five miles an hour to practically about, around twenty, eighteen to twenty miles an hour, and after—

Q. Pardon me. Go ahead.

A. After that why I was approaching him closer all the time and I see he wasn't going to try to get off, so I give the train the emergency.

Q. And how fast were you going when you struck him?

A. I will say about—around fifteen miles an hour.

Q. Now, how far were you away from him when you gave an emergency application to the brakes to stop your train?

A. Oh, I will say between 500 and a thousand feet.

Q. Then your train, after you gave it the service application, your train kept on—

A. Sure! Kept on going, but slowing up all the time."

(R. 65, 66, 67).

The following testimony deals with the question whether the train could have been stopped after the engineer realized the deceased was having trouble removing the motor car:

"Q. You didn't give any emergency application to your air brakes on the train until you were about 500 feet from him; is that correct?

A. That is correct.

Q. And you stopped then in about a thousand, 900 to a thousand——

A. Between 800 and 900 feet, something like that.

Q. Now, if you had applied your emergency brake when you were about half a mile back with your train——

A. Yes, If I had applied the emergency brake——

Q. Yes, you would have stopped your train in the same distance, would you?

A. Oh, I would have stopped it quicker, because after you give a train a service application it wouldn't stop near as quick as it will if you give it an emergency.

Q. So if you had given it instead of the service application of the brake, if you had given the emergency——

A. *Yes, but there was no occasion to do it.*

Q. Yes, but he was only a quarter of a mile ahead of you.

A. But he could step off any time.

Q. He didn't step off.

A. He was off and then he got back on again.

Q. You saw him on the track. He got back on.

A. Yes.

Q. And was pushing there.

A. *I figured he was getting the car off all the time. You meet them every day, the same conditions.*

Q. Yes, I know. But I just want to find out about this accident. He had been off the track and he came back along?

A. Yes.

Q. And he was back on the track again when you were about a quarter of a mile from him?

A. Oh, I will say before that, after we was a quarter of a mile, he got back on the track again and then got ahold of the car and was shoving it off. I can demonstrate to the jury, if you want me to.

Q. No, I just want to find out, if you had applied the brakes when you whistled the second time, if you had applied the brakes, you would have stopped your train before you struck him, wouldn't you?

A. Oh yes.

Q. And his car was on the track and his car was still on the track?

A. I would have just about stopped."

(R. 68-70).

"Q. Mr. Lamphier, at the time you blew the second signal when you were a quarter of a mile away about, Mr. Deere then being at the landing about—that is correct, isn't it?

A. Yes.

Q. Did Mr. Deere have time in the ordinary course of the way those things go to then have time to get his speeder off?

A. Oh, yes, I figured he had plenty of time to get it off then. I have had a lot closer calls than that and knowed them to get them off."

(R. 110).

Nearly all the authorities to which counsel for petitioner refers to sustain his position on this point are based on the hypothesis that the injured plaintiff was unaware of the presence of the object which was involved in the accident.

From the undisputed evidence in this case it is apparent NOT *that petitioner's decedent was unaware of the train but that he clearly knew and appreciated that the train was coming. Otherwise, why would he have tried to remove his motor car from the track?*

It is established in the case without contradiction *First,* that the semaphore which petitioner's decedent was approaching before respondent's train came into view indicated the approach of the train. *Second,* petitioner's decedent could see the respondent's train for 2020 feet before he arrived at the place where the collision occurred. *Third,* three separate whistle signals, each of two long, a short and a long blasts, were given prior to the collision. *Fourth,* PETITIONER'S DECEDENT WAS LOOKING TOWARD AND AT THE APPROACHING TRAIN JUST BEFORE THE COLLISION OCCURRED.

Not only is it undisputed that petitioner's decedent knew the train was coming, but there is no evidence whatsoever that respondent knew and appreciated, or should have appreciated that petitioner's decedent was unaware of the approach of the train, or if it be assumed that there is such evidence, that respondent knew and appreciated or should have appreciated that decedent was unaware of the approach of the train in time to have avoided the collision.

A fair consideration of all the engineer's testimony clearly indicates that he never did know that decedent would not or could not step aside to avoid being struck. There is not even a suggestion that the engineer ever knew that petitioner's decedent did not know a train was coming. *It is inconceivable that an individual of decedent's experience would not know when a train was approaching him so closely that his life was endangered.*

The engineer realized he was going to strike the motor car when he made the emergency application of the brakes 500 feet north of the point of collision, but the uncontradicted evidence shows that it was then impossible to stop

the train before passing the point of collision. It would have been necessary to have put the brakes in emergency while the engine was a full quarter of a mile away before it would have been possible to stop before reaching the point of collision. *There is absolutaly no testimony which would support an inference that the engineer had any idea that the car would not be removed when he was a quarter of a mile north of the point of collision.* In fact his testimony affirmatively shows that *there was plenty of time for petitioner's decedent to get the car off the track when he started to take it off and while the train was still a quarter of a mile away* and he had seen him take it off in a lot shorter time on many other occasions.

How then can petitioner argue that the engineer should have made an emergency application of the brakes while the engine was still a quarter of a mile away? There was no occasion for alarm then and after the engine passed the quarter mile mark and it appeared that the deceased was having trouble with the car *it was then too late to stop before passing the point where the collision occurred, but there was nothing to prevent the deceased from stepping aside right down to the moment the engine struck the motor car.* THE ONE AND ONLY PERSON WHO COULD HAVE AVOIDED THE ACCIDENT WAS DECEDENT HIMSELF.

This accident occurred in California and two recent California cases are directly in point.

In *McHugh v. Market St. Ry. Co.*, 29 Cal. App. (2d) 737, 85 P. (2d) 467, plaintiff was injured in a collision between an automobile he was driving and one of defendant's streetcars. Plaintiff attempted to invoke the doctrine of last clear chance but the lower court granted de-

fendant's motion for an involuntary nonsuit. In affirming the nonsuit the appellate court said on page 470 of 85 P. (2d):

"It is quite certain, however, that under the admitted facts of the present case the doctrine of the last clear chance is not available to plaintiff, for the reason that it has been specifically held that the doctrine has no application where by the exercise of ordinary care the plaintiff up to the very moment of the accident could have avoided it. (Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; 19 Cal. Jur. p. 658, and 8 Cal. Jur. Supp. p. 368, and cases cited therein); nor where the driver of an automobile is in no apparent peril until the very moment of the collision with the street car (Read v. Pacific Electric Ry. Co., 185 Cal. 520, 197 P. 791). In other words, if after a plaintiff is aware of the danger, and being able to escape it by the exercise of ordinary care, he neglects so to do, he cannot invoke the last clear chance to place the burden of the resulting loss upon the other party, because obviously, if both parties to an accident could by the exercise of ordinary care have avoided it, neither can be said to have had the last clear chance.

* * *

"The defendant's motorman was not required to presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there was no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track."

The later case of *Behne v. Pacific Electric Ry. Co.*, 30 Cal. App. (2d) 437, 86 P. (2d) 843, is likewise in point. In that case, plaintiff, a pedestrian, was struck as she stepped onto defendant's track. The motorman had seen plaintiff approaching the track and had blown the whistle when he first saw her. Unbeknown to the motorman she was stone deaf. The motorman made an emergency application of the brakes as soon as he realized she was not paying attention to his signals. Plaintiff relied upon the last clear chance doctrine and contended, as counsel for appellant contends here, that the fact that the car could have been stopped if the brakes had been applied when plaintiff was first observed is sufficient to warrant the submission of the question of defendant's negligence to the jury. The lower court granted a nonsuit and in affirming the judgment the appellate court said:

> "* * * the motorman had a right to assume that when deceased was approaching the railroad crossing she was in full possession of her faculties of sight and hearing, and that she would look and see the car, hear the whistle, or observe the swinging wigwag, and stop to let the car go by. Walking as deceased was, she could have stopped practically instantly at any time prior to stepping upon the north track, while no duty rested upon the motorman to attempt to stop until he concluded, or should have concluded in the exercise of ordinary care, that she was about to step on to his track. That the motorman, while traveling twenty miles per hour, applied his emergency brakes when approximately eighty feet from the deceased and while she was in the neighborhood of nine or ten feet from the north track, seems to us an indication of an exercise of care greater than the ordinary care required of him by the law; because in the final analysis, the doctrine of the last clear chance is really founded upon the humane principle that no one can wilfully

and wantonly run down and injure another simply because the latter, through his own negligence, places himself in a position of danger. It is when an act is committed with wilfulness and wantonness that contributory negligence on the part of the injured person is not an element which will defeat recovery. The motorman was under no duty to assume that the deceased would not do what many pedestrains do each day—walk toward a railroad track, stop within two or three feet thereof, and still not be in danger. It is true the motorman testified deceased was at all times 'looking straight ahead,' but this did not preclude her from seeing the wigwag in motion, and the motorman was not charged with knowledge that she was deaf and could not hear the whistle of the car. And even if we assume that there is evidence tending to contradict the testimony of the motorman as to when he applied the brakes, and there was just a possibility that the speed of the car might have been lessened and the accident avoided by their application when he first saw the deceased in the vicinity of the track upon which his car was traveling; yet to charge the motorman with negligence under the facts here present would be carrying the doctrine of last clear chance beyond the limits of the decisions, because, as was said in *Choquette v. Key System Transit Co. and Santa Fe Ry. Co.,* 118 Cal. App. 643, 657, 5 P. (2d) 921, 927:

> 'Where a person is approaching a place of danger and all the warnings of such danger have been given that reasonable care requires, those in charge of the dangerous instrumentality, seeing such person thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it.' "

The fact that deceased was an experienced trainman, whose work required him to be constantly on the lookout for trains, makes it even more apparent that the engineer had no reason to suspect that deceased would not step aside and avoid injury.

If the last clear chance doctrine would not warrant the submission of the two cases above quoted to the jury—it surely would not aid petitioner in this case.

On Page 19 of Petitioner's Brief, it is stated: "The decision of the court below applying it to the evidence in this cause is in direct conflict with the following decisions in applying the doctrine of last clear chance." We shall consider the authorities cited under this statement in the order that they are mentioned.

The case of *Chunn v. City & Suburban Ry.*, 207 U. S. 302; 52 L. ed. 219, merely states the familiar rule that if the defendant actually discovered the peril of the injured person in time to avoid the collision and failed to take steps to avert it, liability would result. The facts in the case bear no similarity to the facts in this case and it can not be said, by any possible stretch of the imagination, that the judgment in this case in any way conflicts with the one entered in that case.

The case of *Kansas City RR Co. v. Ellsey*, 275 U. S. 236, states the rule which is applicable in California, where this accident occurred, that liability may ensue if defendant negligently fails to discover the peril of the injured person in time to avoid the collision. It likewise bears no similarity to this case and the ruling of the trial court or the Circuit Court of Appeals herein can not be said to conflict with it.

The case of *Southern R. Co. v. Gray*, 241 U. S. 333; 60

L. Ed. 1031, is direct authority against the position which petitioner attempts to assume in this case and supports our contention. In that case *by the time the injured person's peril became apparent to the engineer, it was too late to avoid the collision and the court held that the last clear chance doctrine did not apply.* In this case there is no evidence that the engineer was aware of petitioner's decedent's peril or should have realized that he would not or could not step aside in time to have avoided the collision. Therefore, the humanitarian or last clear chance doctrine cannot apply.

The case of *Chicago, Milwaukee, St. P. & P. R. R. Co. v. Kane,* 33 F. (2d) 866 (C.C.A. 9th Cir.), is not in point because under the facts it appeared that the plaintiff was walking along the tracks with his back to the engine unaware of its approach and no attempt was made to warn him until it was too late for him to step aside and avoid being hit. We have already shown that under all the evidence in this case petitioner's decedent knew the train was approaching and, in any event, every possible warning was given him long before the collision occurred.

In *Central Vermont Ry. v. Sullivan,* 86 F. (2d) 171, a trackwalker was killed when he was struck on an open bridge. Measurements showed he could have seen the train for more than 2000 feet as it approached and there was enough time for him to have gotten off the bridge while it was traveling that distance. The lower court submitted the case to the jury and it found for plaintiff. On appeal the court held that a directed verdict for the railroad should have been granted at the close of the evidence, overruling the contention made by plaintiff that there was evidence which warranted the submission of the case to the jury under the last clear chance doctrine. The court said on page 174:

"The only question that remains to be considered is whether the plaintiff introduced sufficient evidence to support the verdict on the ground that there was negligence on the part of the engineer in not stopping the train after Sullivan was seen in a dangerous situation and before he was hit.

"The engineer testified that, as the train approached the bridge, he did not and could not see it or any one on it owing to the curve in the track. The head brakeman sat in the front seat on the fireman's side of the engine looking out of the front window of the cab and also back along the train to see that everything was all right. When about 250 to 300 feet south of the bridge the fireman, who had been stoking the engine, took his seat back of the brakeman. At that point and practically at the same time both the fireman and brakeman saw Sullivan on the track and gave notice to the engineer to stop. The engineer shut off steam, blew the whistle, sanded the tracks, and applied the emergency brakes, stopping the front end of the engine, after hitting Sullivan, from 75 to 100 feet north of the bridge, or some 580 feet from the position of the train when Sullivan was first seen. He did not reverse the engine. The plaintiff says this was negligence; that, if he had, the train might have been stopped in season to have avoided the accident. No evidence, however, was introduced to show in how many feet this train which consisted of five loaded freight cars, a caboose, and an engine with its tender having a total weight of 476 tons and running at 30 miles an hour, could have been stopped if the engine had been reversed, under the conditions there existing. The engineer testified that he made a good stop—there was nothing from which the jury could have found to the contrary."

In the above case—as in the instant case—(1) the deceased could have seen the train in time to have avoided the accident, (2) warning signals were given as soon as the

deceased was seen, (3) the emergency brakes were applied as soon as it was discovered that deceased was in danger *but* (4) it was then too late to stop before passing the point of collision.

We are unable to understand how counsel for petitioner can contend that this case is in conflict with the above case, *since it supports our position and not petitioner's.*

In *De Baur v. Lehigh Valley R. Co.*, 269 Fed. 964, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of the District Court dismissing the complaint where it appeared that the engineer did everything possible to stop the train after he became aware of the fact that the deceased employee was sitting on one of the rails apparently unconscious of the fact that the train was approaching.

If this case can be considered in point at all, *it sustains respondent's position* and it cannot be contended that the judgment in the instant case in any way conflicts with it.

The case of *Arnold v. Owens,* 78 F. (2d) 495, involves a collision between a truck and a pedestrian who was walking on the right hand side of the highway in violation of a city ordinance. The court held that the contributory negligence of the plaintiff in violating the ordinance would not bar her right to recover if the truck driver observed plaintiff and by the exercise of ordinary care could have avoided striking her. The case is so different on the facts that the judgment in this case can not be said to conflict with it.

The case of *Preston v. Union Pacific RR Co.*, 292 Mo. 442; 239 S. W. 1080, is likewise distinguishable on the facts. In that case, the injured party was unaware of

the approach of the train and it was obvious to anyone that he did not know that the train was approaching. It is therefore clearly distinguishable on the facts, since in the instant case it is apparent that the decedent knew, for a considerable time before the accident occurred, that respondent's train was approaching.

PROXIMATE CAUSE
ASSUMPTION OF RISK
CONTRIBUTORY NEGLIGENCE

SUMMARY: *The facts of this case are not such as to make applicable any of the broad general principles set forth by petitioner under these headings.*

Pages 22, 23 and 24 of Petitioner's Brief, contain several familiar general statements of the law upon the subjects mentioned above.

No useful purpose would be served by either considering or discussing the statements or authorities which are cited.

This is simply a case in which petitioner sought to impose liability upon the respondent on the basis of two specific charges of negligence. *First,* in not furnishing the decedent with sufficient help to remove his one-man motor car from the track, and, *second,* in failing to exercise the last clear chance of avoiding the collision.

Under the uncontradicted evidence there was no reason why a second man should have been furnished to ac-

company the decedent and therefore there was no obligation upon respondent in this regard.

Insofar as the last clear chance is concerned, petitioner contended that the decedent was unaware of the fact that the respondent's train was approaching, whereas the uncontradicted facts established beyond any question that he knew the train was coming. Petitioner further contended that respondent knew the decedent was unaware of the approach of the train, whereas the evidence showed that the engineer never did know that the decedent was unaware of the approach of the train, and, on the contrary, the engineer saw that decedent was looking at the train, as it approached.

Petitioner contended that respondent could have stopped the train after it became apparent that the decedent was unaware of the approach of the train, whereas the evidence showed not only that there was no reason why the deceased could not have stepped from between the rails right down to the last fraction of a second before the collision occurred, but that the engineer applied the emergency brakes when he first noticed that the deceased was having trouble removing the motor car but that it was then too late to stop the train before reaching the point where the collision occurred.

No question of proximate cause is involved. Plaintiff merely failed to prove the negligence upon which her claim was founded. The trial court had no alternative but to grant respondent's motion for a directed verdict.

Neither the trial court nor the Circuit Court of Appeals decided the case on the basis of contributory negligence.

Neither the trial court nor the Circuit Court of Appeals decided the case solely upon the doctrine of assumption of risk.

In any event, under *Chesapeake & O. Ry. Co. v. Nixon*, 271 U. S. 218, 70 L. ed. 914, and *Connelly v. Penn RR Co.*, 201 Fed. 54, it is clear that the decedent did, in fact, assume the risk of injury from trains operating upon the track.

CONCLUSION

The asserted conflict in the decisions does not exist.

The decisions below are the result of an application of the facts to known and accepted principles of law.

No reason exists why this court should again review the facts which have twice been examined with the same result.

The petition lacks substantial grounds and should be denied.

Respectfully submitted,

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